STATE OF MICHIGAN

COURT OF APPEALS

MABEL J. DAVIS,

Plaintiff-Appellant/Cross-Appellee,

v

FORD MOTOR COMPANY,

Defendant-Appellee/Cross-Appellant.

UNPUBLISHED
February 21, 2003

No. 232694
Wayne Circuit Court
LC No. 99-914411-NZ

Before: Markey, P.J., and Smolenski and Meter, JJ.

PER CURIAM.

In this employment discrimination case, plaintiff appeals by right the circuit court's grant of summary disposition pursuant to MCR 2.116(C)(10). Additionally, defendant cross-appeals the circuit court's denial of mediation sanctions pursuant to MCR 2.403(O). We affirm in part and reverse in part.

Plaintiff alleged that defendant had failed to promote her ten times since 1995 because of discrimination based on her race and sex. Plaintiff is an African-American female with a bachelor's degree in industrial technology and an MBA. Plaintiff has been defendant's employee since 1977. In nine of the ten situations, men were hired to fill the vacant position that plaintiff desired, three of whom were African-American males. Plaintiff asserts that she was "as qualified or better qualified for the positions than those who were selected based upon her extensive experience, education, and years of service to defendant." First, plaintiff asserts that the lower court erred in granting defendant's motion for summary disposition. Plaintiff contends that the lower court erred when it determined that plaintiff failed to establish a prima facie discrimination case where plaintiff satisfied all prongs of the *McDonnell Douglas* test and that the lower court further erred in comparing the respective qualifications of the other candidates at the prima facie stage of the evaluation. We disagree.

On appeal, we review de novo a trial court's grant or denial of summary disposition. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). In a case such as this where no direct evidence of impermissible bias is offered, in order to avoid summary disposition, plaintiff must proceed through the steps outlined in *McDonnell Douglas Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973). The *McDonnell Douglas* approach allows a plaintiff "to present a rebuttable prima facie case on the basis of proofs from which a factfinder could *infer* that the plaintiff was the victim of unlawful discrimination."

DeBrow v Century 21 Great Lakes, Inc (After Remand), 463 Mich 534, 537-538; 620 NW2d 836 (2001). To establish a claim within the *McDonnell Douglas* framework, plaintiff was required to present evidence that (1) she belonged to a protected class; (2) she suffered an adverse employment action; (3) she was qualified for the position; and (4) the job was given to another person under circumstances giving rise to an inference of unlawful discrimination. *Hazle v Ford Motor Co*, 464 Mich 456, 463; 628 NW2d 515 (2001); *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998).

There is no dispute in this case that plaintiff satisfied the first two elements of the *McDonnell Douglas* test: 1) that she belonged to a protected class as an African-American woman, and 2) she suffered adverse employment action. With regard to the third prong, that she was qualified for the position, defendant asserts that plaintiff was not qualified for at least one of the positions, but that she was at least minimally qualified for many of the positions. However, plaintiff failed to satisfy the fourth prong, that the job was given to another person under circumstances giving rise to an inference of unlawful discrimination.

Plaintiff asserts that the lower court erred in its analysis when it went through an individual by individual comparison of plaintiff to the person ultimately selected for the job. In each situation, the court concluded that the other candidate was legitimately a better choice for the job, and as a result concluded that plaintiff had failed to establish a prima facie case. Plaintiff relies on *Hazle, supra* at 469-470, wherein our Supreme Court stated:

> Because a plaintiff has no obligation to prove relative qualifications to a jury, it can hardly be disputed that a plaintiff cannot be *required* to offer evidence that he is at least as qualified as the successful candidate in order to establish a prima facie case under *McDonnell Douglas*.
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> Nor does anything in the language of the Civil Rights Act itself suggest a requirement that a plaintiff prove relative qualifications in order to succeed on a discrimination claim, let alone require that a plaintiff offer such evidence in order to survive a motion for summary disposition or directed verdict.

Plaintiff's contention that *Hazle* stands for the proposition that a comparison should never be made between a plaintiff and the successful candidate ignores our Supreme Court's analysis of the fourth prong of *McDonnell Douglas* in that case. In *Hazle*, *supra* at 458, the plaintiff was an African-American woman who worked as a pension clerk for the Ford-UAW Retirement Board. She applied for a position as office manager but was rejected in favor of a white candidate from outside the office. *Id*. at 459. The plaintiff satisfied the first three prongs under *McDonnell Douglas. Id.* at 471. She presented evidence to satisfy the fourth prong that she was rejected in favor of a less qualified white applicant. *Id.* at 472. Our Supreme Court opined:

> Although she was not required to proceed in this manner, plaintiff presented evidence suggesting that she was rejected in favor of a less qualified white applicant. There was evidence that (1) only plaintiff had a college degree and credits toward a master's degree in industrial relations, and (2) only plaintiff had substantial work experience with defendants. Thus, we conclude that plaintiff

> presented evidence supporting the fourth and final element of a *McDonnell Douglas* prima facie case, and that the burden then shifted to defendants to articulate a legitimate, nondiscriminatory reason for their decision to hire [the successful candidate] instead of plaintiff. [*Id* at 471-472.]

This analysis indicates that while a plaintiff is certainly not *required* to submit relative qualifications at the prima facie stage, when a plaintiff argues, as does plaintiff in the present case, that the fourth prong should be satisfied because plaintiff possesses skills superior to other applicants, such a comparison is appropriate. In fact, the Court in *Hazle* stated:

> As a matter of law, an inference of unlawful discrimination does not arise merely because an employer has chosen between two qualified candidates. Under such a scenario, an equally--if not more--reasonable inference would be that the employer simply selected the candidate that it believed to be most qualified for the position. *Id*. at 471.

Plaintiff merely asserts that because she had extensive "background and experience," and because defendant never told her that she was not qualified for the promotions, she has established a prima facie case of discrimination. We disagree. Plaintiff is essentially attempting to argue that the circumstances that should give rise to an inference of unlawful discrimination in this case are her superior qualifications. However, plaintiff would have us accept her assertion that she was the superior candidate when credible evidence exists to the contrary. Clearly, case law allows the lower court to examine those circumstances that the plaintiff argues give rise to an inference of discrimination to determine whether those circumstances actually do give rise to such an inference.

Plaintiff failed to establish a prima facie case of discrimination, and thus our analysis need not proceed any further. However, even assuming that plaintiff had established a prima facie case, then defendant would have an opportunity to articulate a legitimate, nondiscriminatory reason for its employment decision in an effort to rebut the presumption created by plaintiff's prima facie case. *Hazle, supra* at 464. "The articulation requirement means that the defendant has the burden of producing evidence that its employment actions were taken for a legitimate, nondiscriminatory reason." *Id*. If the employer so articulates, the presumption created by the *McDonnell Douglas* prima facie case drops away. *Id*. at 465. At that point, in order to survive a motion for summary disposition, the plaintiff must demonstrate that the evidence in the case, when construed in the plaintiff's favor, is "sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Lytle, supra* at 176. A plaintiff "must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for [unlawful] discrimination." *Hazle, supra* at 465-466, quoting *Lytle, supra* at 175-176.

Defendant's legitimate, nondiscriminatory reason for not promoting plaintiff was that the other candidates were more qualified than plaintiff. In determining whether an employment decision is a "legitimate, nondiscriminatory" one, it must be noted that courts must not analyze the "soundness" of that decision. In other words, courts must not second-guess whether the employment decision was "wise, shrewd, prudent, or competent." *Town v Michigan Bell Telephone Co*, 455 Mich 688, 704 (Brickley, J.); 568 NW2d 64 (1997). Instead, the focus is on whether the decision was "lawful," that is, one that is not motivated by a "discriminatory

animus." *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 257; 101 S Ct 1089; 67 L Ed 2d 207 (1981).

Plaintiff presented evidence that defendant gave subjective reasons for selecting other individuals and that she engaged those in management in several conversations during which she made it clear that she was interested in a promotion. She also points to the testimony of a supervisor wherein he praised her people skills as proof that she did possess the necessary leadership qualifications for these positions. However, none of that evidence would "permit a reasonable trier of fact to conclude that discrimination was a motivating factor" or that defendant's failure to promote plaintiff to the grade level she desired was a pretext for unlawful discrimination. In addition to failing to establish a prima facie case of discrimination, plaintiff has failed to persuade us that defendant's proffered reasons for promoting other candidates rather than plaintiff were a pretext for discrimination. As a result, we decline to grant relief on this issue.

Second, plaintiff argues that the statistics she offered are evidence that defendant's reasons for its adverse conduct toward her are pretextual and that the trial court improperly refused to admit and consider that evidence. We review the decision whether to admit evidence for an abuse of discretion. *Chmielewski v Xermac, Inc*, 457 Mich 593, 614; 580 NW2d 817 (1998).

Generally, all relevant evidence is admissible, and irrelevant evidence is not. MRE 402; *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 188-189; 600 NW2d 129 (1999). Evidence is relevant if it has any tendency to make the existence of a fact which is of consequence to the action more probable or less probable than it would be without the evidence. MRE 401; *Dep't of Transportation v Van Elslander*, 460 Mich 127, 129; 594 NW2d 841 (1999).

Plaintiff offers case law to support the idea that statistics showing that an employer has discriminated against other employees are generally admissible, and that statistics concerning the general atmosphere of discrimination, although not conclusive, are usually relevant to show that the employer discriminated against an individual plaintiff. However, an examination of the proffered statistics reveals that they are essentially meaningless in the context of proving discrimination. Their main flaw is that they do not take into account the number of black females who are actually qualified to fill managerial positions at the Livonia plant. Merely stating that 13.5 percent of the population of Wayne County is black females, and that defendant's plant employed only 1.5 percent black females does not warrant the conclusion that defendant must be discriminating against black females. In *Wards Cove Packing Co, Inc, v Atonio*, 490 US 642, 650-651; 109 S Ct 2115; 104 L Ed 2d 733 (1989), the Supreme Court noted that it was statistically meaningless to compare two positions or employees where one does not possess the skills or qualifications of the other. For plaintiff's statistics to be relevant, plaintiff should offer statistics regarding "similarly situated" employees. See *Cosgrove v Sears, Roebuck & Co*, 9 F3d 1033, 1041 (CA 2, 1993) (statistical analysis is properly limited to similarly situated employees). Plaintiff's statistics are not relevant; thus, the trial court properly excluded these statistics, and the trial court did not abuse its discretion by doing so. We decline to grant relief on this issue.

Finally, defendant cross appeals arguing that the trial court abused its discretion by denying mediation sanctions based on the rationale that meaningful discovery was not conducted

until after mediation. We apply an abuse of discretion standard when reviewing a trial court's denial of sanctions. *Luidens v 63rd District Court*, 219 Mich App 24, 37; 555 NW2d 709 (1996).

In the present case, plaintiff filed her lawsuit in May 1999. Both parties conducted written discovery at the outset of litigation and filed witness lists in November 1999. In January 2000, plaintiff moved to extend discovery. The trial court granted the motion and extended discovery until March 22, 2000. Mediation was scheduled for May 2000. The result of the mediation was an award of $10,000 to plaintiff. Defendant accepted and plaintiff rejected. Before discovery closed, plaintiff took no depositions, nor at the time of mediation had plaintiff taken any depositions. However, by June 19, 2000, plaintiff had deposed five individuals. The trial court ultimately granted defendant's motion for summary disposition in January 2001, but denied an award of mediation sanctions against plaintiff.

MCR 2.403(O)(1)[1] states in part: "If a party has rejected an evaluation and the action proceeds to verdict, that party must pay the opposing party's actual costs unless the verdict is more favorable to the rejecting party than the mediation." MCR 2.403(O)(11) states: "If the a 'verdict' is the result of a motion as provided by subrule (O)(2)(c) [a judgment entered as a result of a ruling on a motion after rejection of the mediation evaluation], the court may, in the interest of justice, refuse to award actual costs."

We could find no published Michigan case law directly addressing the "interests of justice" provision of MCR 2.403(O)(11). However, we have previously addressed the "interest of justice" exception set forth in a different, yet analogous, court rule, MCR 2.405(D)(3). In *Luidens*, this Court placed extensive limitations on a trial court's discretion to refuse to award costs under MCR 2.405(D)(3). This Court stated:

> Finally, we turn to the issue of attorney fee awards under MCR 2.405. Difficulty regarding this issue results from the "interest of justice" provision of MCR 2.405(D)(3)--"The court may, in the interest of justice, refuse to award an attorney fee under this rule." The term "interest of justice" is not defined in the rule. We therefore look to the language and purpose of the rule to set the parameters of this term. MCR 2.405(D)(1) and (2) set forth a general rule that actual costs "must" be paid. MCR 2.405(D)(3) then sets forth an exception--that the court may refuse to award an attorney fee in the interest of justice. That this is an exception to a general rule guides interpretation of the "interest of justice" provision. The purpose of MCR 2.405 is "to encourage settlement and to deter protracted litigation." *Hamilton v Becker Orthopedic Appliance Co,* 214 Mich App 593, 596; 543 NW2d 60 (1995). In the context of this purpose and the fact that the "interest of justice" provision is an exception to a general rule, this Court has held that, "absent unusual circumstances," the "interest of justice" does not preclude an award of attorney fees under MCR 2.405. *Gudewicz v Matt's*

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[1] Amendments to the court rules, effective August 1, 2000, changed the terminology, replacing "mediation" as used in MCR 2.403, with "case evaluation." However, because "mediation" was the operative term during the time of the present suit, and because the parties and the lower court used that terminology, we will also use it in this opinion.

Catering, Inc, 188 Mich App 639, 645; 470 NW2d 654 (1991). In *Butzer v Camelot Hall Convalescent Centre, Inc (After Remand)*, 201 Mich App 275, 278-279; 505 NW2d 862 (1993), this Court held:

> "The better position is that a grant of fees under MCR 2.405 should be the rule rather than the exception. To conclude otherwise would be to expand the "interest of justice" exception to the point where it would render the rule ineffective." [Citations omitted.]

The *Hamilton* Court stated at 596:

> "[W]hile the rule allows the trial court discretion to deny an award, 'few situations will justify denying an award of costs under MCR 2.405 in the "interest of justice." ' [Quoting 2 Martin, Dean & Webster, Michigan Court Rules Practice, authors' comment, 1995 Supp, p 157.]"

With respect to a decision not to award attorney fees under MCR 2.405, the *Hamilton* Court held at 597 that "the trial court must articulate why the 'interest of justice' will be served in light of the role that MCR 2.405 was designed to serve in the administration of our judicial process under the Michigan Court Rules." It continued at 597:

> "[I]n the absence of any articulated and compelling rationale, we believe that the interest of justice is served by awarding attorney fees and costs to vindicate the purpose of the rule, thereby increasing the prospect that parties seriously will engage in the type of settlement process the rule clearly contemplates. [*Luidens, supra* at 31-33.]

MCR 2.403 and MCR 2.405(D)(3) share a common purpose: to encourage settlement and to deter protracted litigation. Thus, we will apply the same logic outlined above in *Luidens* and *Hamilton* to our interpretation of the "interest of justice" exception to MCR 2.403(O)(11). The failure of a party to conduct discovery during the time allotted by the trial court should not constitute an "unusual circumstance." The trial court justified its ruling on its conclusion that plaintiff did not have the opportunity to evaluate and base her decision on affidavits and briefs that only became available after mediation. Where plaintiff offers no explanation for her failure to conduct discovery before mediation, we do not find this rationale to be persuasive.

Holding that a failure to take advantage of discovery before mediation constitutes an unusual circumstance would lead to interpretations of this rule whereby the "interests of justice" exception in MCR 2.403(O)(11) would expand in cases decided by motion to the point where the exception swallows the rule, rendering the actual rule ineffective.

When the Supreme Court adopted MCR 2.403, it set out the general rule with a single, and therefore narrow, exception. Had the Supreme Court wished this exception to be broad enough to accommodate a party's failure to take advantage of discovery before mediation, it would have done so. There is, however, nothing in the existing language of the court rule that gives the slightest indication that this was the Court's intent.

We recognize that the test for an abuse of discretion is very strict, often elevating the standard of review to an apparently insurmountable height. *Sparks v Sparks*, 440 Mich 141, 150-151; 485 NW2d 893 (1992). In spite of this high burden, we find no evidence in the record to support a conclusion that this situation was an "unusual circumstance" that should trigger a denial of mediation sanctions "in the interest of justice." Therefore, defendant is entitled to mediation sanctions pursuant to MCR 2.403(O). Plaintiff argues that the amount of fees defendant requested is grossly excessive and unjust; therefore, we remand for a determination of actual costs.

We affirm in part, reverse in part, and remand for a determination of actual costs. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ Michael R. Smolenski
/s/ Patrick M. Meter